IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1538 OF 2007
IN
SUIT NO.1186 OF 2007

Bharat Shantilal Shah & Anr. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1553 OF 2007
IN
SUIT NO.1194 OF 2007

Anoop Virajlal Mehta ...Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1973 OF 2007
IN
SUIT (L) NO.1314 OF 2007

Bina Bharat Shah & Anr. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1974 OF 2007
IN
SUIT (L) NO.1316 OF 2007

Solo Real Estate Developers Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1975 OF 2007
IN
SUIT NO.1258 OF 2007

Dia Anoop Mehta ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1976 OF 2007
IN
SUIT (L) NO.1318 OF 2007

Rajiv B. Shah ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH
NOTICE OF MOTION NO.1977 OF 2007
IN
SUIT (L) NO.1317 OF 2007

Rashesh B. Shah & Anr. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1978 OF 2007
IN
SUIT NO.1959 OF 2007

Devanshu Anoop Mehta ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1979 OF 2007
IN
SUIT NO.1741OF 2007

Reshma Rashesh Diamonds Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1980 OF 2007

IN
SUIT NO.1740 OF 2007

Jyothawat Constructions Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1981 OF 2007
IN
SUIT NO.1724 OF 2007

Vishal Rajeev Diamonds Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.1982 OF 2007
IN
SUIT NO.1689 OF 2007

Reshma R. Mehta & Anr. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2123 OF 2007
IN
SUIT NO.1725 OF 2007

Banyan Properties Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2124 OF 2007
IN
SUIT NO.1199 OF 2007

Mohit Anoop Mehta ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2125 OF 2007
IN
SUIT NO.1269 OF 2007

Anoop Mehta (Son and Legal heir of late
Mr.vrajlal C. Mehta ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2126 OF 2007
IN
SUIT NO.1638 OF 2007

Desai Trade credits Pvt.Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2127 OF 2007
IN
SUIT NO.1638 OF 2007

Desai Equipment Finance Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2128 OF 2007
IN
SUIT NO.1688 OF 2007

Desai Home Finance Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2842 OF 2007
IN
SUIT NO.1267 OF 2007

Desai Auto Credits Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

WITH

NOTICE OF MOTION NO.2843 OF 2007

IN
SUIT NO.1268 OF 2007

Desai Built-In-Finance Pvt. Ltd. ....Plaintiffs
Versus
The Royal Palms (I) Pvt. Ltd. Ors. ....Defendants

Mr.Virag Tulzapurkar, Senior Counsel with Mr.Vaibhav Krishna i/b. Juris Consiuis for the Plaintiff (In Notice of Motion No.1538 of 2007)

Mr.Ravi Kadam, Advocate General with Mr.Vaibhav Krishna i/b Juris Consiuis for the Plaintiffs (In Notice of Motion No.1558 of 2007)

Mr.Janak Dwarkadas, Senior Counsel with Mr.Vaibhav Krishna i/b Juris Consiuis for the Plaintiffs (In Notice of Motion No.1978 of 2007)

Mr.Vaibhav Krishna i/b Juris Consiuis for the Plaintiff in all other matters.

Mr.T. R. Andhyarujina, Senior Counsel with Mr.J. J. Bhatt, Senior Counsel with Mr.Pankaj Sawant, Mr.Cyrus Ardheshir, Mr.Pradip Kapadia, Mr.Prasanna Jave and Mr.Kamlesh Rajwani i/b Vigil Juris for the Defendants (In all the matters.)

CORAM : S.J. VAZIFDAR, J.
DATE : 30TH OCTOBER, 2007.

ORAL JUDGMENT :

1. The above suits are filed for specific performance of each of the agreements entered into by the respective Plaintiffs and the Defendants, for a declaration that the suit properties are in the

possession of the respective Plaintiffs and for orders protecting the same. All the above suits also contain the usual alternative prayer for damages.

2. The Plaintiffs broadly belong to two groups, the Shah group and the Mehta group. Each group comprises of the members of the respective families and their associate concerns/firms.

Defendant Nos.2, 3 and 4 are the directors of Defendant No.1. For convenience, the reference in this judgment to `the Defendants' refers to Defendant No.1. Defendant No.1, formerly known as Amir Parks And Amusements Pvt. Ltd., carries on business as a builder and developer and deals in real estate in Mumbai.

3. Defendant No.1 is the owner of land admeasuring about 240 acres at Andheri, Mumbai. The property falls in a no development zone, wherein only certain restricted/controlled and limited development is permissible under the Development Control Regulations for Greater Mumbai, 1991. Defendant No.1 had proposed such development on the said property including a golf club, amusement park and residential structures with limited FSI as part of

the project referred to as Royal Palms Estate.

4. As part of the project, the Defendants offered for sale plots admeasuring about 2.5 acres each. In the year 1993, the Plaintiffs in each of the suits agreed to purchase from the Defendants a plot admeasuring 2.50 acres. These twenty plots are the subject matter of the above suits. Ten suits each have been filed by the members of the Shah and the Mehta groups.

5. The facts in the above suits are similar. For convenience Counsel confined their arguments to Notice of Motion No.1538 of 2007 in Suit No.1186 of 2007. I will accordingly refer to the facts therein.

6. By an agreement in writing dated 27.9.1993 Defendant No.1 agreed to sell to the Plaintiffs the suit plot for a consideration of Rs.7,50,000/-.

Clauses 1, 2, 3, 5, 9, 15, 17, 18, 19, 21 and 23 of the agreement are relevant and read as under :-

> 1. The Vendor shall sell and the Purchaser shall purchase from the Vendor all that the said premises delineated on the plan hereto annexed and thereon surrounded by a yellow coloured boundary line at or for the price of

Rs.7,50,000/- (Rupees seven Lakhs and Fifty Thousand only) payable as follows :-

(a). A sum of Rs.75,000/- as earnest money and/or deposit on or before the execution hereof (the payment and receipt whereof the Vendor doth hereby admit and acknowledge);

(b). A sum of Rs.67,500/- being part of the consideration price within 10 days from the site mobilization by the Vendor on or before the 30th day of September 1993 on the part of the Vendor time being the essence of the contract;

(c). A sum of Rs.67,500/- being part of the consideration price within 7 days from the plot demarcation by the Vendor on or before the 30th day of September 1993 on the part of the Vendor time being the essence of the contract;

(d). A sum of Rs.67,500/- being part of the consideration price within 7 days from the completion by the Vendor of the road (base) upto the entry of the said premises on or before the 30th day of September 1993 time being the essence of the contract on the part of the Vendor;

(e). A sum of Rs.67,500/- being part of the consideration price within 7 days of the Vendor laying Storm-Water Drains along the road abutting the said premises on or before the 30th day of October 1993 time being the essence of the contract on the part of the Vendor;

(f). A sum of Rs.67,500/- being part of the

consideration price within 7 days of the Vendor putting up sufficient street lights as per guidelines issued by the Municipal Corporation of Greater Bombay & other concerned bodies and authorities on or before the 30th day of October 1993 on the part of the Vendor time being the essence of the contract;

(g). A sum of Rs.67,500/- being part of the consideration price within 7 days from the construction and installation by the Vendor of main drainage line upto the entrance of the said premises enabling the Purchaser to connect his drainage line thereto on or before the 30th day of November, 1993 time being of the essence of the contract on the part of the Vendor;

(h). A sum of Rs.67,500/- being part of the consideration price within 7 days of the Vendor installing and of putting up the electric cables with 30 KW connection upto the said premises on or before the 31st day of December 1993 time being the essence of the contract on the part of the Vendor. The amounts of deposits payable to BSES Ltd./MSEB in respect of the said connections shall be payable by the Purchaser;

(i). A sum of Rs.67,500/- being part of the consideration price within 7 days from the Vendor completing the asphalting of the road upto the entrance of the said premises on or before the 31st day of December 1993 time being the essence of the contract on the part of the Vendor;

(j). A sum of Rs.67,500/- being part of the

consideration price on the Vendor obtaining the sanction of Lay-out and plans & specifications on or before the 30th day of April, 1994 time being the essence of the contract on the part of the Vendor;

(k). A sum of Rs.67,500/- being the balance of the consideration price on completion and on execution of the Indenture of Conveyance of the said premises;

2. The tenure of the said premises is freehold and the area thereof is 2.5 Acres equivalent to 10090 square meters (including proportionate area under Road).

3. The sale shall be completed within twelve months from the date hereof time being the essence of the contract, subject however to the Vendor carrying out their parts of this agreement within the time stipulated herein.

5. The Vendor shall make out a marketable title to the said premises free from all encumbrances and reasonable doubts and shall at its own costs and expenses get in all outstanding claims on or to the said premises including all claims by way of sale, exchange, mortgage, gift, trusts, inheritance, possession, easement, lease, lien or otherwise.

9. It is hereby agreed that the Purchasers shall pay to the Vendors after the entire infrastructure of the said premises is completed the proportionate cost of the maintenance of the

common amenities, facilities, security charges, maintenance of landscaping in proportion to the area occupied by the Purchasers including the cost of maintenance of the drainage plaint to be installed by the Vendor in the said larger property. It is agreed by and between the parties hereto that such amenities and services shall be maintained by the Vendor by itself or through its contractors appointed on professional basis, for the maintenance of the aforesaid and the Purchasers shall pay the same on the bill being submitted to him.

15. The Vendor shall, on completion of sale, put the Purchaser into vacant and peaceful possession of the said premises.

17. The Vendor shall provide at their own costs necessary infrastructure such as water pipeline, electricity supply upto 30 KW, drainage line, street light upto the entry of the said premises. The Vendor declares and represents that the F.S.I. available on the said premises is 0.04, being 0.025 for principal purpose and 0.015 for ancillary including Varandah, Balcony, Garages, Store Rooms, Watchman Cabin etc. In the event the said F.S.I. as declared and represented by the Vendor is not available on the said premises, the Vendor shall without prejudice to the Purchaser's rights make available to the Vendor the whole of the said F.S.I. or the deficit thereof from the other portions of the larger property.

18. The Vendor shall have the plans for

construction of the building and structures on the said premises sanctioned on behalf of the Purchaser. The Purchaser shall however bear and pay the cost of the sanctioning of the said plans.

19. It is agreed by and between the parties hereto that the Vendor shall get the larger property sub-divided by the Municipal Corporation of Greater Bombay and other concerned bodies and authorities on or before the 30th day of April 1994 time being of the essence of the contract at its own costs and expenses. However, in the event the sub-division is not sanctioned by the Municipal Corporation of Greater Bombay and other concerned bodies and authorities then the Vendor shall demarcate the said premises and convey the same to the Purchaser.

21. The Purchaser is fully aware that the said premises falls under No-Development Zone and the construction of a building is permissible only as per the Development and Control Regulations of the Municipal Corporation of Greater Bombay. As per Rules 60 & 61 of the said Development Control Regulations of the Municipal Corporation of Greater Bombay the Purchaser shall be entitled to construct to the extent of only 0.04 F.S.I. on the said premises.

23. It is agreed by and between the parties hereto that the Vendor shall get the said premises sub-divided at its own costs and expenses with a right to access to the said premises from the main road as shown on the plan thereof annexed

> hereto and shall give necessary covenant for the Right of Way to the Purchaser. However, the Purchaser hereby agrees with the Vendor that he will not further sub-divide the said premises after the sub-division is sanctioned and use the same for residential purposes only and shall construct only one house with maximum F.S.I. of 0.04 as provided hereinabove in clause 21. and shall give necessary covenant to the Vendor as and when Conveyance is executed."

7. At the outset, it is necessary to note four important and admitted facts. The Plaintiffs in all the suits admittedly paid the entire purchase price even before the time for payment stipulated under the agreements. The Defendants had applied for and obtained permission from the concerned authorities under the Bombay Municipal Corporation Act for construction on each of the twenty plots. The Plaintiffs in each of the suits have also paid the amounts demanded by the Defendants from time to time towards the costs of obtaining permission from the authorities for constructing the bungalows and developing their respective plots. The Defendants had demarcated the plots as per the Plaintiffs' request. The Defendants have however not stated the particulars regarding the same on affidavit.

8. Though the Defendants have admitted the above facts they have resisted the Notice of Motion on the following grounds :-

(1) The suit is barred by the law of limitation. The period of limitation according to them started running on 29.1.2003 and in any event on 17.1.2004 and the suit was filed on 18.4.2007.

(2) The Plaintiffs had lost interest in the agreements.

(3) The Plaintiffs are not entitled to specific performance on the ground of delay in filing the suit.

(4) The Plaintiffs are not entitled to the discretionary relief of specific performance in view of the alternate development proposed and undertaken by the Defendants after they allegedly terminated the agreements. This contention was based on the orders obtained by the Defendants under the SEZ Act and in view of the construction having commenced by the Defendants on some of the suit plots.

(5) The Plaintiffs are not entitled to specific performance as sub-division of the larger plot is not permissible.

(6) The Plaintiffs had failed to identify the suit plots.

(7) The balance of convenience is in favour of the Defendants.

FACTS

9(A). In July, 1995, the Defendants' Architects M/s.Bipin Barot prepared a plan inter-alia for the construction of a bungalow on each of twenty plots and submitted the same to the Municipal Corporation of Greater Mumbai. Pursuant to clause 18 of the agreement, the Defendants on 20.7.1995, submitted the same in their name but for the benefit of the Plaintiffs for construction of cottages on the suit plots.

(B). The BMC issued an IOD dated 25.9.1995 bearing No.E.B./CE/6772 BS/Ap in respect of the plot in Suit No.1186 of 2007. Similarly, IODs were also issued in respect of the remaining nineteen plots. It is pertinent to note that in the IOD addressed to the Defendants, the BMC stated : “With reference to your Notice, letter No..... and the plans, Sections, Specifications and Description and further particulars and details of your building at.....”

(C)(i). The Defendants thereafter submitted to the Plaintiffs a debit note dated 1.12.1995 for a sum of Rs.1,30,000/- being the charges

paid by them on behalf of the Plaintiffs towards IOD deposit, debris deposit, staircase premium etc. paid on behalf of the Plaintiffs “in respect of one cottage”.

(D). M/s.Bipin Barot, the Defendants Architects and Engineers by a letter dated 12.1.1996 addressed to the Executive Engineer, B. M. C. stated that “the layout was already submitted ..... However, the same is to be amended due to declaration of the slum of some of the pockets of the holding under reference and due to change in the location and size of the buildings in the layout .....”

(E)(i). Under cover of a letter dated 3.8.1996, the Defendants forwarded to the Plaintiffs the said IOD. The Defendants stated :

“We are pleased to inform you that the IOD in respect of your bungalow has been received. Enclosed please find photocopy of the IOD conditions along with copy of the plan for your reference and record.”

(ii). The Plaintiffs paid the same as evidenced by a receipt executed by the Defendants dated 8.12.1995.

10. Debit notes were also forwarded by the Defendants/their

sister concern Amir Constructions and Motel Pvt. Ltd. for proportionate costs for infrastructural work on the said plots. Each of the Plaintiffs has admittedly paid the amounts so demanded as evidenced by the receipts executed by the Defendants. The Plaintiffs in Suit No.1186 of 2007 in respect of a debit note dated 7.6.1996 paid a sum of Rs.7,00,000/- as evidenced by receipts dated 12.6.1996 and 4.7.1996.

11(A). The Defendants by a letter dated 1.9.1996 informed the Plaintiffs that they had appointed New Town Management Technology Pvt. Ltd. (for short " NTM") as the maintenance company in respect of Royal Palms Estate. The Defendants stated that they had explained the terms of the said agreement. It is important to note that the subject matter of the letter is stated to be the maintenance of each of the cottages. The name of NTM was changed to Royal Palms Property Pvt. Ltd. The Plaintiffs case is that it is an associate/sister concern of the Defendants.

(B). NTM in turn addressed a letter dated 1.9.1996 to the Plaintiff introducing themselves and enumerating the scope of services. In their letter dated 1.9.1996 addressed to the Plaintiffs, NTM

stated :-

> "We have gone through the Master Plan identified, individual precints like Residence, Club House, Golf Course, Landscaping, Roads etc. and have developed a maintenance programme."

12. The Defendants obtained a Commencement Certificate (C.C.) dated 14.9.1996 on behalf of the Plaintiffs. Though the CC does not specify the plot it refers to and is in relation to the relevant IOD.

13. NTM in its letters dated 7.12.1998 addressed to the Plaintiffs referred specifically to the plot number of each of the Plaintiffs and stated that the C. C. would be expiring and needed to be renewed. NTM demanded the payment towards the BMC charges for renewal of the C. C. and its process fees. NTM further stated that it would not have the C. C. renewed unless the payment was received from the Plaintiffs in advance along with the maintenance dues and alleged that the maintenance charges had been outstanding for over a year.

14. Prior thereto in the year 1997, it was represented by the

Defendants to the Plaintiffs that it would not be possible to sub-divide the said plots and that therefore, the plots would be notionally sub-divided and instead of a conveyance a document of lease would be executed by Defendant No.1 in favour of the Plaintiffs whereby the Plaintiffs would be granted a perpetual lease for a period of 999 years. Negotiations in this regard ensued between the parties.

(A). By a letter dated 27.3.2002, the Defendants admitted the negotiations regarding the lease. They further stated that they had prepared a draft deed of lease and that the same had been forwarded to the Plaintiffs' consultant and many meetings were held without any result. The Defendants alleged that the Plaintiffs failed to complete the formalities in connection therewith to avoid payment of maintenance charges and other outgoings in respect of the plots. The Defendants stated that if the arrears of maintenance aggregating to Rs.11,13,197/- were not paid they would take appropriate action.

(B). The Plaintiffs by their letter dated 18.4.2002 stated that a survey of the plots agreed to be purchased was done in the year 1999 in the presence of all the parties and that poles were installed by their

surveyor for the purpose of demarcation. The Plaintiffs alleged that the poles had been dismantled without intimation to them and that the Defendants had wrongly realigned and altered the demarcation. The Plaintiffs stated that they were ready and willing to take vacant possession of the plot duly surveyed and demarcated and called upon the Defendants to arrange for a joint survey for demarcation. They further stated that upon demarcation and upon their being permitted to put up the poles, they would take vacant possession of the plots and execute the lease deed and other documents.

(C). The Defendants by their letter dated 19.5.2002 expressly contended that the demarcation of the plots as requested by the Plaintiffs had been done in the year 2000 itself and that joint inspection could be done against the execution of necessary documents and payment of maintenance and dues by the Plaintiffs. The Defendants admitted that a survey of the plots had been done in the year 1999 but alleged that the same had been done unilaterally by the Plaintiffs. The Defendants further stated that the Plaintiffs had installed the poles after the survey but alleged that the same had been done in a high

handed manner, was unauthorized and therefore not acceptable. The Defendants admitted that a joint survey was carried out in the year 2000 but alleged that for the reasons best known to them the Plaintiffs had chosen not to finalise the lease deed and take possession of the plot and complete the transaction. The Defendants agreed for another joint survey of the plots and also demarcation thereof but only on the condition that necessary documents were finalised and arrears of the maintenance charges were cleared prior thereto. The Defendants concluded by stating that they were ready to discharge their obligations as far as demarcation of the plots was concerned provided the Plaintiffs finalised the documents and made the payments of the arrears of the maintenance charges. The Defendants alleged that the infrastructure had been completed and was in place.

(D). The Plaintiffs contend that a plan dated 10.6.2002 prepared by the Defendants' Architect M/s. R.V. Jaykar and Surveyor was handed over to Plaintiff No.1 on behalf of all the Plaintiffs and that the plan showed all the plots as also the corresponding IOD' sobtained in respect of each of the plots.

It is important to note that the Defendants do not deny the plan. Nor do they deny the demarcation shown thereon. They contend that it showed only a proposed demarcation which was not actually carried out at site. They further deny that the plan was handed over to the Plaintiffs.

(E). By a letter dated 29.9.2002 the Defendants once again called upon the Plaintiffs to pay the alleged arrears of maintenance.

(F). The Plaintiffs by their letter dated 22.10.2002 stated that the draft lease deed and incidental deeds and writings had been finalised by them and forwarded by their consultant to the Defendants' advocate. The Plaintiffs further stated that they were ready and willing to take possession of the plots against the execution of the lease deed and other writings approved and finalised by them and for that purpose called upon the Defendants to hand over the possession of the plots “as already demarcated”.

(G). Under cover of a letter dated 21.1.2003, the Plaintiffs consultant forwarded to the Defendants' advocate a draft of the lease deed for approval stating the same to be subject to changes upon

discussion between the parties.

15. The Defendants did not respond to the above letters or to the draft lease deeds sent therewith. Instead by their advocates letter dated 29.1.2003 they sought to terminate the agreement.

16. The Plaintiffs by their consultant's letter dated 31.1.2003 expressed surprise at the letter of termination dated 29.1.2003 and stated that they were in fact awaiting the approval from the Defendants to the documents forwarded to them for approval.

17. It would be convenient to pause in the narration of facts at this stage and to refer to the further facts while considering the defences.

Whether the suit is barred by limitation having been filed more than three years after the letter dated 29.1.2003

18. Article 54 of the Limitation Act 1963, reads as under :-

"54. For specific performance of a contract	Three years	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has

notice that performance is refused."

Mr. Tulzapurkar however contended that the first part applies in view of Clause 3 of the agreement and the Defendants not having fulfilled their obligation the period of limitation has not started running. Considering the view that I have taken of Mr.Andhyarujina's submission on facts, it is not necessary to consider Mr. Tulzapurkar's submission in this regard.

19. Mr.Andhyarujina contended that the suit is barred by the law of limitation having been filed three years after the letter dated 29.1.2003. The submission is based on the premise that the second part of column 3 of Article 54 is applicable. I have proceeded on the basis that it does.

20. The letter dated 29.1.2003 reads as under :-

"Re : Lease of plots of Mr.Bharat Shah & Ors.

Dear Sir,

I am concerned for Royal Palms (India) Pvt. Ltd. Having its office at Survey No.169, Aarey Milk Colony, Goregaon (East), Mumbai-400065 under whose instructions I have to address you as

under :

> My clients state that Without Prejudice meeting was held with your Mr.Sameer Sanghavi on 26th October 2002 when your client Mr.Bharat Shah and Mr.Anoop Mehta were present and till date the matter between your clients and my clients is not resolved.
>
> My clients therefore instructed me to inform you which I hereby do that the Agreements which are already entered into by your clients and my clients stands terminated."

21. The Plaintiffs' case is that at a meeting held on 3.7.2003 between Plaintiff No.1, the Plaintiffs consultant and the Defendants' advocate, it was mutually agreed that the letter of termination dated 29.1.2003 stood withdrawn.

It is true that these minutes have not been signed by the Defendants advocate or by any other person on behalf of the Defendants. Despite the same, atleast prima-facie it appears that the Plaintiffs' contention in this regard is well founded. Two important facts support the Plaintiffs' contention.

22(A). Firstly, even after the alleged termination, the Defendants by their letters dated 8.2.2003 and 15.2.2003 demanded payments from

the Plaintiffs in respect of the suit plots. It is true that the demand pertained to the period prior to the said letter of termination. However, the letters do not refer to the termination. Nor do they state that they are without prejudice to the termination.

(B). That by itself may not have been of significant assistance to the Plaintiffs. What is important however, is that by their letter dated 30.6.2003 the Defendants demanded the maintenance charges from the Plaintiffs for the period of nine months even after the purported termination. By the said letter the maintenance charges were demanded for the period January, 2003 to June, 2003. Further an advance was demanded for the period of July, 2003 to September, 2003. Further still a deposit was demanded for the period of 12 months i.e. upto 30.6.2004.

23. This certainly is an important fact which supports the Plaintiffs' case that the termination stood withdrawn. I will presume that the said minutes wrongly recorded that at the meeting held on 3.7.2003 it was mutually agreed that the termination stood withdrawn. As rightly contended by Mr.Tulzapurkar the demand for the

said charges even beyond the date of termination indicates that the termination stood waived and impliedly withdrawn.

24(A). Faced with this, reiterating the stand in paragraph 5 of the affidavit in reply dated 26.6.2007, it was contended before me that after the letter of termination dated 29.1.2003, without prejudice talks were held between the parties to explore the possibility of an amicable settlement; that during the discussions the parties discussed de-novo a proposal from the Plaintiffs about the Defendants' executing the lease-deed in favour of the Plaintiffs since it was not legally permissible to sub-divide the larger property and to carve out a plot of 2.5 acres for the Plaintiffs therefrom and to convey it and that the negotiations did not fructify into a binding agreement.

(B). It is of crucial significance to note that the suggestion in paragraph 5 of the Defendants' affidavit in reply is that the negotiations regarding the alternate mode of implementing the suit agreement by entering into an agreement of lease was mooted only after the letter of termination dated 29.1.2003. This contention is ex-facie incorrect as is virtually admitted before me and is clear from the

admitted record. The proposal regarding the lease deed commenced atleast as far back as on 27.3.2002 i.e. ten months before the purported termination and continued till 21.1.2003 i.e. prior to the letter of termination dated 29.1.2003. I have already referred to the correspondence in this regard.

25. Reading this correspondence as a whole leaves me with the impression that what transpired between the parties was that the letter of termination was withdrawn and in any event the termination was waived in toto and the parties attempted thereafter to continue to implement the original agreement by the said alternate mode of executing the lease deeds. In other words, I do not consider what transpired between the parties as suggesting that the termination of the original agreement stood and the parties merely negotiated afresh a settlement of their disputes which arose as a consequence of the termination.

26(A). To explain the Defendant's conduct of forwarding the maintenance bills after the letter of termination including for the period subsequent to the letter of termination, Mr.Andhyarujina and Mr.Bhatt

reiterated what is stated in paragraph 59 of the affidavit in reply dated 26.6.2007. Since considerable emphasis was placed on this aspect, I will set out the relevant part relied upon by them which reads as under :-

> "I say that in the said without prejudice meeting held on 3rd July 2003 the discussions centered on exploring the possibility of an amicable settlement, but no such settlement was reached. One of the points of discussions related to the "without prejudice" de novo proposal of execution of Lease Deed in respect of the Deed of Conveyance. In such an eventuality, i.e. in the event of the parties agreeing to de novo execution of a Lease Deed, the Plaintiff would then have been liable to pay the charges for maintenance of common infrastructure even beyond the date of termination of the Agreement i.e. even beyond 29th January 2003. It was in these circumstances i.e. in the eventuality of the parties agreeing de novo to the execution of a Lease Deed that the Royal Palms Property Pvt. Ltd. forwarded to the Plaintiff a copy (by way of proforma / sample) of the maintenance charges that would be payable by the Plaintiff (i.e. the document at Exhibit-N to the plaint addressed to Mr.Rashesh Bharat Shah). It is pertinent to note that the Plaintiff claims that in the document (at Exhibit-N to the Plaint) addressed to the Plaintiff has been "misplaced". However, as explained hereinbefore since the ` without prejudice' de novo talks did not fructify in any mutual agreement, the said document is of no

> consequence. Hence, the Plaintiff did not even bother to pay the said charges."

(B). It is important to note that it is not even the Defendants' case that it was agreed between the parties that the said bills were forwarded on the basis that the Plaintiffs would pay the same only in the eventuality of the parties agreeing de-novo to the execution of a lease deed. Nor is it the Defendants' case that it was agreed between the parties that the said bills were "by way of a pro-forma/sample". The pleading clearly is to the effect that this was the Defendants perception of the matter. There is nothing to suggest that this perception was shared by the Plaintiffs. Even during the hearing before me, it was not even suggested that there were any discussions or that there was any understanding between the parties that the maintenance bills would require to be paid by the Plaintiffs only in the event of a fresh lease deed being executed and that what was forwarded was only by way of a proforma/sample.

(C). In any event, the explanation on affidavit must be tested at the hearing of the suit, after a trial. The onus is clearly on the

Defendants to establish the same. I am not inclined to accept the averments alone to reject the Plaintiff's case.

27. I am therefore, unable to ignore the effect of the maintenance bills for the period after the termination on the rival contentions between the parties regarding the waiver by the Defendants of the letter of termination. I am inclined, at this prima-facie stage, to accept Mr.Tulzapurkar's submission that the termination stood waived and withdrawn.

28(A). There is yet another fact which supports Mr.Tulzapurkar's submissions in this regard. Between 16.12.2003 and 5.1.2004 the Plaintiffs' Architects had admittedly surveyed and demarcated the suit plots and fixed RCC poles.

(B). The Plaintiffs' consultants, M/s.Rane Management Consultants Pvt. Ltd. by a letter dated 6.1.2004 addressed to the Plaintiffs' Chartered Accountant confirmed that as per the Plaintiff' s instructions they completed the survey and boundaries demarcation work of each of the twenty plots as per the drawings and the plans handed over by the Defendants' Architect. They further stated that

they had demarcated the boundaries of the plots on the basis of the said plans and fixed the RCC poles; that the survey work had been entrusted to them in the presence of all the Defendants and the representatives of the Shah and the Mehta groups; that the survey and the demarcation work was carried out between 16.12.2003 to 5.1.2004 in the presence of the Civil Engineers and the representatives of the Defendants' Architect and that fixing of the poles was completed and the boundaries were demarcated on each plot on the basis of the plans submitted by the Defendants' Architect. M/s.Rane Management and Consultants Pvt. Ltd. referred to the difficulties experienced in respect of one of the plots due to the existence of huts whose owners opposed the demarcation and fixing of the poles as well as due to the objection by the film city who disputed the boundaries. The Defendants, it is alleged had appointed a person for solving the matter.

(C). A copy of this letter was not forwarded to the Defendants. It therefore is a unilateral record of the alleged facts by the Defendants' consultants to the Defendants' Chartered Accountant. It is however,

important to note that in a letter dated 17.1.2004, which I will have occasion to deal with in great detail later, the Defendants' advocates expressly admitted the fact that the survey and demarcation had been carried out by M/s. Rane Management Consultants Pvt. Ltd. They however alleged that the same was prejudicial to their rights, was part of the de-novo discussion between the parties and that the Defendants had not accepted the same.

29. These facts to my mind also strongly support atleast at the interlocutory stage Mr.Tulzapurkar's submission that the termination of the agreement by the Defendants stood withdrawn and/or waived. There is no other explanation for the Defendants permitting the Plaintiffs' consultants to survey the property and to demarcate the boundaries without any fresh negotiations having culminated into an agreement especially when even according to the Defendants the demarcation of the plots as requested by the Plaintiffs had already been done in the year 2000 itself after a joint survey was carried out (see the letter dated 19.5.2002 referred to earlier).

Even assuming that at the meeting held on 3.7.2003 it had

not been agreed on behalf of the Defendants that the termination stands withdrawn, the aforesaid conduct of the parties in demanding maintenance for a period after the termination of the agreement and agreeing to a survey and demarcation of the premises being carried out between 16.12.2003 and 5.1.2004 indicates a waiver of the termination by the Defendants.

30. The Plaintiffs have made out more than just a strong prima-facie case regarding the withdrawal and/or waiver of the termination of the agreement by the Defendants. The least that must be said in favour of Mr.Tulzapurkar's submission is that it is a question which certainly requires to be tried. I am not inclined to virtually non-suit the Plaintiffs in respect of their claim for specific performance on the ground of limitation in these circumstances.

Whether the suit is barred by limitation having been filed more than three years after the letter dated 17.1.2004

31. It was contended by Mr.Andhyarujina that in any event the period of limitation commenced from 17.1.2004 in view of a letter of that date addressed by the Defendants' advocate to the Plaintiffs

Chartered Accountant. As rightly submitted by Mr.Tulzapurkar the letter ought to be considered in the context and circumstances in which it was written.

32. After the survey was admittedly carried out and the demarcation of the plots was done by the Plaintiffs' consultants M/s.Rane Management Consultants Pvt. Ltd between 16.12.2003 and 5.1.2004 Plaintiff No.1 by his letter dated 10.1.2004 addressed to the Defendants recorded the same. The Plaintiffs further recorded that the formalities of fencing of the entire property had been completed and physical possession thereof had been handed over to them. The Plaintiffs reiterated their commitment to pay the maintenance charges after infrastructure facilities were provided and the encroachers on two plots were removed. The Plaintiffs also requested the Defendants to revalidate the IOD and CC to arrange the sanction of the plans at the earliest at the Plaintiffs' costs to enable them to commence the development.

The Defendants have denied the receipt of this letter. A determination of the authenticity of this letter must await the trial. It is

not possible at this stage, to opine on the same with any degree of certainty. There is no other record from either side pursuant to the said survey and demarcation admittedly carried out. I cannot therefore ignore the letter at this stage.

33. By a letter dated 13.1.2004, addressed to the Defendants' advocate, the Plaintiffs' Chartered Accountant stated that the lease deeds pertaining to the plots agreed to be leased by the Defendants were engrossed, adjudicated and ready to be executed but the same could not be executed as the plots had not been surveyed and the boundaries not demarcated and fenced. Pausing here it must be noted that this assertion pertains to the period prior to the survey and demarcation of the plots referred to in the Plaintiffs' Architects' letter dated 6.1.2004. This is also clear from what follows.

The letter then refers to the survey and the demarcation by M/s.Rane Management Consultants Pvt. Ltd. of all but two of the plots which had been encroached upon and states that the Plaintiffs were desirous of proceeding with the execution of the lease deeds pertaining to the remaining plots which had not been encroached

upon.

34. This brings me to a consideration of the letter dated 17.1.2004 addressed by the Defendants' advocate to the Plaintiffs' Chartered Accountant and relied upon by Mr.Andhyarujina in support of his submission that the suit is barred by limitation. The letter was in reply to the letter dated 13.1.2004. As the letter is relied upon to defeat the Plaintiffs' suit for specific performance even without the benefit of a trial it would be appropriate to set it out in extenso. It reads thus :-

> "Dear Sir,
>
> We are in receipt of your letter dated January, 13 2004 with instructions from our clients M/s.Rane Palms (India) Private Ltd. To reply thereto as follows.
>
> At the outset we have to state that all the discussions, meetings and drafts of agreement that were exchanged were purely `without prejudice' and were not binding on our clients till signing of a deed of lease by our clients on the document finally approved by them. In fact, without this understanding and in view of the earlier threatening posture adopted by your clients, our client were not ready to proceed further in the matter. Our clients had

> always entertained the discussions without you and your clients de-novo on the basis of the above express understanding that all these discussions and drafts would always be considered and treated as without prejudice to our clients' rights and contentions. As part of the de novo discussion your client had conducted a survey of the said property by M/s.Rane Management Consultants Private Limited before proceeding further with the transaction. Our clients had permitted your client to carry out the said survey without prejudice to their rights. Our clients have not accepted the survey and demarcation of boundaries by the said M/s.Rane Management Consultants Private Ltd.
>
> In the light of this our clients are quite upset with your letter, language of which gives a colour of finality to the documents and the transaction. Our clients had clearly informed you that the documents would be considered final and binding only upon their signing them and only thereafter they were to be submitted for adjudication. Our clients as such hereby record that they are very much upset by the language of your letter and in view of the same the de novo and without prejudice discussions are hereby treated as of no effect and void and the matter is closed by our clients, which please note."

35. It is necessary to note that the Plaintiffs' Chartered Accountant's letter dated 13.1.2004 is prefaced thus : "Re. : Lease of plots at Goregaon to the Bharat Shah group." The letter dated

13.1.2004 referred entirely only to the alternate mode of implementing the suit agreements namely by executing the lease deeds. This is clear not only from the subject matter of the letter but from the contents thereof as well. In other words, the implementation of the original agreement for sale was not dealt with at all.

The letter dated 17.1.2004 which was in reply to this letter does not refer to the implementation of the original agreements for sale either. The letter read as a whole clearly takes exception to the suggestion by the Plaintiffs' Chartered Accountant that there was a finality to the alternate mode of implementation of the original agreements for sale. The first sentence of the last paragraph of the letter makes this clear. The word “matter” in the last sentence of the letter therefore pertains to the lease deeds and not to the original agreements for sale.

In other words I am in agreement with Mr.Tulzapurkar that the letter read as a whole and in the context of the preceding letter indicates that it was only the alternate mode of implementation of the agreements for sale viz. entering into a lease agreement, which was

put an end to by the Defendants.

36. Further though by the letter dated 17.1.2004 the Defendants treated the matter regarding the execution of the lease deeds as closed, they did not once again terminate the original agreements for sale. In the circumstances, the question of limitation does not arise.

37. So viewed, the fact that the Plaintiffs' Chartered Accountant by his letter dated 30.1.2004 withdrew his letter dated 13.1.2004 is of no consequence. All that the letter dated 30.12004 did, in this context was to withdraw the contention that the alternate mode of implementing the agreements for sale by execution of lease deeds had attained finality.

38. The Plaintiffs' case regarding the withdrawal and/or the waiver of the termination and that the agreement had been kept alive is also supported by the fact that not once has there been an offer from the Defendants that in view of the termination of the agreement they were willing to return the purchase price or any part thereof or that they were ever even ready and willing to do so.

39. Again, the least that must be said in favour of Mr.Tulzapurkar's submission is that this is more than just an arguable case and it would be unfair in the extreme to non-suit the Plaintiffs on the ground of limitation without the benefit of a trial.

40. In this view of the matter, it is not necessary to consider Mr.Tulzapurkar's further submission that the second part of Article 54 of the Limitation Act applies in the present case.

Whether the Plaintiffs had lost interest in the agreements ?

Whether the Plaintiffs are disentitled to specific performance on the ground of delay ?

41. Mr.Andhyarujina submitted that the fact that the Plaintiffs did nothing from 17.1.2004 till the filing of the suit reflects upon the conduct of the Plaintiffs indicating total disinterest on their part in the agreement disentitling them to specific performance. He submitted that this fact also militates against their contention regarding the withdrawal of the termination of the agreements by the Defendants.

42. I am unable to accept either of these submissions. I will

ignore Mr.Tulzapurkar's reliance upon the letter dated 6.5.2005. The receipt thereof has been disputed by the Defendants. However as rightly pointed out by Mr.Tulzapurkar there remained nothing to be done by the Plaintiffs in respect of the agreement for sale. While the Plaintiffs together had agreed to purchase 50 acres, it must be remembered that this was part of a larger property admeasuring 240 acres and was also a part of the project ` Royal Palms Estate'. Under clause 9 of the agreement, the Plaintiffs are liable to pay the costs of the maintenance only after the entire infrastructure of the said premises is completed. Mr.Tulzapurkar submitted that the entire infrastructure has not been completed including what is required by clauses 1(e) and 1(h) of the agreement. It is not necessary to specify each of these items as I did not hear Mr.Andhyarujina and Mr.Bhatt to contend that the infrastructure had been provided. As noted earlier, the Plaintiffs have paid the entire purchase price under their agreements though time for payment had not arrived. They also paid all other costs that I have referred to. No amounts were payable by them thereafter towards the maintenance as the infrastructure had not

been completed. They really had nothing left to do on their part. It was for the Defendants to complete the infrastructure and complete the sale which they had failed to do. In these circumstances, it would be rather unfair to deny the Plaintiffs the reliefs despite their having paid the full purchase price and other costs, charges and expenses. Even assuming that they did nothing in the matter till the filing of the suit, which of course is denied by the Plaintiffs I do not find any force in the submission that the Plaintiffs' conduct indicates that they were not interested in going ahead with the transactions. Nor is there any delay in the filing of the suit.

Further, this is not a case of plots being sold independently and unconnected with anything else. The suit plots were part of the Royal Palms Estate project comprising 240 acres. The project involved the development of a variety of facilities and the Plaintiffs were bound to pay for the same in proportion to the area occupied by them (see clause 9). The Defendants had not completed the construction of all the facilities/infrastructure. Thus, even if the Plaintiffs took no steps for enforcing their rights till the same were

threatened it would not be unusual or indicative of a loss in interest in the agreement. In these circumstances, nor do I see any delay on the Plaintiff's part in filing the suit.

43. Mr.Andhyarujina admitted that it was not the Defendants' contention that the Plaintiffs had abandoned the agreement. Indeed it would be rather unusual to expect a purchaser who has paid the full purchase price to abandon an agreement. There is nothing on record which even remotely suggests the same. A purchaser who has paid the full purchase price being disinterested in completing the transaction and abandoning it without even asking for a refund of the purchase price is contrary to the normal course of human conduct.

44. That being the case the Plaintiffs cannot be denied specific performance even assuming there was any delay in filing the suit. Mr.Tulzapurkar' ssubmission that mere delay will not disentitle a party to specific performance is well founded. In this regard his reliance upon the judgments in the case of *Eswari Amma v. M.K. Korah, AIR 1972 Madras, 339*, *Mool Chand v. Ved Prakash, AIR 1981 Allahabad, 152* is also well founded. This aspect is in fact covered in the Plaintiff' s

favour by the judgment of the Supreme Court in *Mademsetty Satyanarayana v. Yelloji Rao (1965)2 SCR, 1405*. Though the judgment was not cited during the hearing, I do not consider it necessary to bring it to the notice of the Defendant's counsel as I accept Mr.Tulzapurkar' ssubmission both on principle and on the basis of the judgments of the Delhi and Allahabad High Courts. Further, the judgment has been referred to in *Mool Chand*' *s*case (supra). Paragraphs 8 to 12 of the judgment of the Apex Court read as under :-

> **"8.** Mr Lakshmaiah cited a long catena of English decisions to define the scope of a court's discretion. Before referring to them, it is necessary to know the fundamental difference between the two systems — English and Indian — qua the relief of specific performance. In England the relief of specific performance pertains to the domain of equity; in India, to that of statutory law. In England there is no period of limitation for instituting a suit for the said relief and, therefore, mere delay — the time lag depending upon circumstances — may itself be sufficient to refuse the relief; but, in India mere delay cannot be a ground for refusing the said relief, for the statute prescribes the period of limitation. If the suit is in time, delay is sanctioned by law; if it is beyond time, the suit will be dismissed as barred by time; in either case, no question of equity arises.
>
> **9.** With this background let us look at the English text-books and decisions relied upon by the learned counsel for the appellant. In *Halsbury's Laws of England*, Vol. 36, at p. 324, it is stated:

"Where time is not originally of the essence of the contract, and has not been made so by due notice, delay by a party in performing his part of the contract, or in commencing or prosecuting the enforcement of his rights, may constitute such laches or acquiescence as will debar him from obtaining specific performance. The extent of delay which has this effect varies with circumstances, but as a rule must be capable of being construed as amounting to an abandonment of the contract. A much shorter period of delay, however, suffices if it is delay in declaring an option or exercising any other unilateral right; and if the other party has already given notice that he does not intend to perform the contract, the party aggrieved must take proceedings promptly if he desires to obtain specific performance."

In *Fry on Specific Performance*, 6th Edn., at p. 517, it is said :

"Where one party to the contract has given notice to the other that he will not perform it, acquiescence in this by the other party, by a comparatively brief delay in enforcing his right, will be a bar: so that in one case two years' delay in filing a bill after such notice, in another case one year's delay, and in a third (where the contract was for a lease of collieries) five months' delay was held to exclude the intervention of the Court."

Learned counsel cited many English decisions in support of his argument that there shall be promptitude and diligence in enforcing a claim for specific performance after a repudiation of the contract by the other party and that mere continual claim without any active steps will not keep alive the right which would otherwise be defeated by laches: see *Clegg* v. *Edmondson*[1], *Eads* v. *Williams*[2], *Lehmann* v. *McArthur*[3], *Watsoh* v. *Reid*[4], and *Emile Erlanger* v. *New Sombrero Phosphate Company*[5]. But as stated earlier, the English principles based upon mere delay can have

no application in India where the statute prescribes the tune for enforcing the claim for specific performance. But another class of cases which dealt with the doctrine of laches have some bearing in the Indian context. In *Lindsay Petroleum Company* v. *Prosper Armstrong Hurd, Abram Farewell, and John Kemp*[6] Sir Barnes Peacock defined the doctrine thus:

"Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

This passage indicates that either waiver or conduct equivalent to waiver along with delay may be a ground for refusing to give a decree for specific performance. In *Caesar Lamare* v. *Thomas Dixon*[7] Lord Chelmsford said:

"The conduct of the party applying for relief is always an important element for consideration."

The House of Lords in *Emile Erlanger* v. *New Sombrero Phosphate Company*[5] approved the passage in *Lindsay Petroleum Company* v. *Prosper Armstrong Hurd, Abram Farewell, and John Kemp*[6] which we have extracted earlier.

10. It is clear from these decisions that the conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver, may in certain circumstances preclude him from obtaining a decree for specific performance.

11. Now we shall consider some of the Indian decisions cited at the Bar. A Division

Bench of the Allahabad High Court held in *Nawab Begum* v. *A.H. Creet*[8] that great delay on the part of the plaintiff in applying to the court for specific performance of a contract of which he claimed the benefit was of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. But it will be seen from the facts of that case that apart from the delay the conduct of the plaintiff was such that it induced the other party to change his position to his detriment. A Division Bench of the Patna High Court in *Rameshwar Prasad Sahi* v. *Mt. Anandi Devi*[9] held on the facts of that case that the delay in bringing the suit for specific performance was always fatal to a suit, and that it amounted to an abandonment of the contract and waiver of his rights to sue for specific performance. If the learned Judges meant to lay down that mere delay would amount to abandonment of a right, we find it difficult to agree with them. The decision of the Calcutta High Court in *Gosthe Behari* v. *Omiyo Prosad*[10] recognized that mere delay was not sufficient to deny the relief of specific performance, but pointed out that though it was not necessary to establish that the plaintiff had abandoned his right, the Court may, in view of the conduct of the plaintiff coupled with his delay that had prejudiced the defendant, refuse to give the equitable relief. In Chamarti Suryaprakasarayudu v. Arardhi Lakshminarasimha[11], a Division Bench of the Madras High Court rightly pointed out that delay by itself was not a ground for refusing to give a decree in a suit for specific performance. Sadasiva Aiyar, J., observed:

"I think that it is an error of law to hold that mere delay amounts to a waiver or abandonment apart from other facts or circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment of the contract on the plaintiffs part."

Seshagiri Aiyar, J., said much to the same

effect, thus:

"There is nothing in the Specific Relief Act which says that laches in bringing a suit will by itself be a ground for refusing specific performance…. Having regard to the fact that a special period of limitation has been fixed for bringing a suit for specific performance, I think the legislature has not intended that mere laches should be one of the grounds for refusing specific performance."

We do not think, though the observations of Sadasiva Aiyar, J., are rather wide, that the learned Judges intended to lay down that unless there is a waiver or abandonment by the plaintiff of his rights to sue for specific performance, he should be non-suited, for if that was the law, as we have pointed out earlier, the substantive part of Section 22 of the Specific Relief Act would become nugatory. A Division Bench of the Calcutta High Court in *Jadu Nath Gupta* v. *Chandra Bhusan* [12] again emphasized the fact that the English doctrine of delay and laches showing negligence in seeking relief in a court of equity cannot be imported into the Indian law in view of Article 113 of the Limitation Act. But it pointed out that where the conduct of the plaintiff was such that it did not amount to abandonment but showed waiver or acquiescence especially when inaction on his part induced the defendant to change his position, the plaintiff ought not to be allowed any relief. This case brings out not only the distinction between English and Indian law but also that waiver or abandonment of a right is not a pre-condition for refusing relief of specific performance.

12. The result of the aforesaid discussion of the case law may be briefly stated thus: While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a court to

> refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression "waiver" in its legally accepted sense, namely, "waiver is contractual, and may constitute a cause of action: it is an agreement to release or not to assert a right"; see *Dawson's Bank Ltd.* [13] v. *Nippon Menkwa Kabushiki Kaisha* [14]. It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief."

45. I have already held that the Plaintiffs cannot be held guilty of delay and laches. There is no case of abandonment and waiver either. As I shall demonstrate shortly, the prejudice if any, to the Defendants is of their own unilateral acts and not attributable to the Plaintiff's conduct.

46. It was suggested that as the agreements were entered into fourteen years ago specific performance ought not to be granted.

47. There is no force in this submission either. Firstly, admittedly the agreements were terminated only on 29.1.2003. Thus,

till then the same were admittedly treated as valid and binding. Even thereafter and the very least it must be said that negotiations to implement them continued till 17.1.2004. Thus, as a matter of fact there is no delay fourteen years. Secondly, the other and in my view, the correct manner of perceiving the matter is that it is the Plaintiffs who are prejudiced as despite having fulfilled all their obligations they have been denied the use of property.

Whether the Plaintiffs are not entitled to the discretionary relief of specific performance in view of the alternate development of the suit land by the Defendants after the letter of termination.

48. Mr. J.J. Bhatt who continued the arguments on behalf of the Defendants submitted that specific performance of the agreement is not possible as after the agreement had been terminated on 29.1.2003, Defendant No.1 had commenced alternate development of the entire land including the suit lands. He submitted that the Defendants had proposed the development of a Special Economic Zone (SEZ) under the Special Economic Zone Act, 2005.

49. Land admeasuring 10.10 hectares had been notified as

SEZ for IT and ITE services. The Government of Maharashtra approved the proposal on 27.9.2006 and recommended the same for the approval of the Government of India. The Government of India approved the same by a letter dated 23.10.2006. Pursuant thereto a notification dated 11.1.2007 had been published in the Gazette of India Extraordinary notifying the said 10.10 hectares land as a SEZ for IT and ITE services under the SEZ Act. The Defendants' proposal for an extension thereof by an additional 11.70 hectares of contiguous land has also been approved by the Government of Maharashtra by a letter dated 10.5.2007. Another area of 10.10 hectares has been proposed by the Defendants as a SEZ for gems and jewellery. The same has been approved by the Government of Maharashtra by its letter dated 6.1.2007.

Thus, Mr.Bhatt contended, about 31.90 hectares i.e. 75 acres are proposed to be developed as a SEZ by the Defendants. 32 acres of the land claimed by the Plaintiffs falls within the said 75 acres proposed to be developed as a SEZ. Mr.Bhatt submitted that in these circumstances, specific performance cannot and in any event ought

not to be granted.

50. If the Plaintiffs have made out a case for the grant of specific performance, I do not see how these factors can deprive them of that right either in law or in equity.

51. Mr.Bhatt, fairly conceded that there is nothing in the SEZ Act which prohibits the grant of a decree of specific performance merely because the land has been so notified under the SEZ Act.

52. The application for notifying the property under the SEZ Act was made unilaterally by the Defendants and without reference to the Plaintiffs. Under section 3 of the SEZ Act any person who intends to set up a SEZ may make a proposal to the State Government for the purpose of setting up the SEZ. Under sub-section (3) any person may at his option make a proposal directly to the Board of Approval constituted under the SEZ Act for the same. Sub-sections (4) to (9) permit the State Government to make such an application, provide for the procedure for applications and the manner in which the Board, the State Government and the Central Government are to deal with the same. Under sub-section (10) the Central Government shall in the

event of approval being granted, issue a letter of approval on such terms and conditions and obligations and entitlements as may be approved by the Board to the developer. Section 4 reads as under :-

> "4. **Establishment of Special Economic Zone and approval and authorization to operate to, Developer.-**(1) The Developer shall, after the grant of letter of approval under sub-section (1)) of section 3, submit the exact particulars of the identified area referred to in sub-sections (2) to (4) of that section, to the Central Government and thereupon that Government may, after satisfying that the requirements, under sub-section (8) of section 3 and other requirements, as may be prescribed, are fulfilled, notify the specifically identified area in the State as a Special Economic Zone:
>
> Provided that an existing Special Economic Zone shall be deemed to have been notified and established in accordance with the provisions of this Act and the provisions of this Act shall, as far as may be, apply to such Zone accordingly:
>
> Provided further that the Central Government may, after notifying the Special Economic Zone, if considers appropriate, notify subsequently any additional area to be included as a part of that Special Economic Zone.

> (2) After the appointed day, the Board may, authorise the Developer to undertake in a Special Economic Zone, such operations which the Central Government may authorise."

53. Clearly, the entire project under the SEZ Act has been undertaken by the Defendants voluntarily and unilaterally. There was no compulsion on the Defendants to do so. Nor is there any compulsion on their part to undertake the project even assuming that it has been notified under the Act in its entirety. Nor was my attention invited to any provision by virtue whereof the Plaintiff is prevented from maintaining this suit including for the relief of specific performance.

54. No doubt, a decree of specific performance is in the discretion of the Court. I see no reason why the Court ought not to exercise its discretion in favour of the Plaintiff in the facts and circumstances of the present case. As stated above, the Plaintiffs have fulfilled all their obligations inter-alia by payment of the full purchase price and all other costs as required. In these circumstances, the Defendants cannot be permitted to defeat a claim

for specific performance by unilaterally embarking on development projects/proposals to the prejudice of the Plaintiffs.

55. Mr.Bhatt submitted that the Plaintiffs were aware of these proposals atleast as on 2.3.2007. That would make no difference. The suit was filed on 18.4.2007. It would make no difference even if the Plaintiffs are deemed to have been aware of the same as on 11.1.2007 by virtue of the gazette notification. On learning about the same, the Plaintiffs in fact raised objections with the concerned authorities including the Government of Maharashtra, Government of India and the Bombay Municipal Corporation. Mr.Tulzapurkar relied upon the judgment of the Supreme Court in *Boothalinga Agencies v. V. T. C. Poriaswami Nadar, AIR 1969 SC 110 and M/s.Gujarat bottling Co. Ltd. And others v. Coca Cola Company and others, AIR 1995 SC 2372,* in support of his contention that the Defendants having voluntarily submitted the proposal for notifying the said lands as a SEZ cannot take advantage thereof to urge that the suit agreements stood frustrated. Mr.Bhatt fairly stated that he was relying upon these facts only in support of his contention that specific performance ought not to

be granted and it was not his contention that as a matter of law specific performance cannot be granted as the agreement stood frustrated in view of the proceedings under the SEZ Act. In that view of the matter it is not necessary to deal with the judgments in any detail.

Whether the Plaintiffs are not entitled to specific performance on the ground that the larger plot cannot be sub-divided

56. It was submitted that sub-division of the larger plot was not possible and that therefore the Plaintiffs are not entitled to specific performance of the agreements.

57. The submission is founded on the erroneous basis that the agreements can be performed only upon the larger plot being sub-divided. Clause 19 of the agreement takes care of the contingency of the sub-division not being possible. In that event, the Defendants are to demarcate the premises and convey the same to the purchaser. There is no law which prohibits such a course. Section 6 of the Transfer of Property Act, 1882 provides that property of any kind may be transferred except at as otherwise provided by the Act or by any

other law for the time being in force. The suit agreements do not fall within any of the excepted items in sub-clauses (a) to (i) of Section 6. Nor is there any other provision either in the Transfer of Property Act or in any other law which prohibits the transfer of the suit property.

58. Indeed, Section 55 of Transfer of Property Act permits it. Section 55(3) of the Transfer of Property Act reads as under :-

> "55(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power ;
>
> Provided that, (a)where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer, of the lot of greatest value,is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies thereof or extracts therefrom as he may require ; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncancelled and undefaced, unless prevented from so doing by

fire or other inevitable accident."

59. Mr.Bhatt relied upon Regulation 60(xiii) of the Development Control Regulations which reads as under :-

> "60. **No Development Zone (NDZ) –** .....
>
> (xiii) A residential building, in an area other than that of an amusement park as in (vi) above, subject to the following :-
>
> (a) Building to be not more than ground and one storey with a height not exceeding 9.75 m. including the height of stilted portion, if any ;
>
> (b) FSI to be not more than 0.05 for independent plots of area upto one hectare each.
>
> (c) For plots each more than one hectare in area FSI to be 0.05 for upto the first hectare and thereafter to be not more than 0.025 for the remaining area of the plot, no sub-division of plots being permitted."

60. I will presume that it may not be possible to subdivide the larger plot. That would make no difference either. There is nothing in the DC Regulations which suggests that a part of a plot cannot be sold unless it is first subdivided. Mr.Bhatt with his usual fairness stated that he was unable to find anything in the DC Regulations

which suggested the same either. Further, the bar in Regulation 60 (xiii)(c) to sub-division of a plot more than one hectare in a no development zone does not imply a bar against alienation of a part of such plot.

61. In the circumstances, I see no reason why even assuming that the plots cannot be sub-divided, the agreement cannot be performed as contemplated in clause 19 thereof which provides that in the event of sub-division not being sanctioned by the BMC and the concerned bodies and authorities, the Defendants shall demarcate the said premises and convey the same to the purchaser.

Whether the Plaintiffs have identified the suit property

62. It was then submitted on behalf of the Defendants that the Plaintiffs had not identified the property in respect whereof specific performance is sought.

63. The Plaintiffs had initially made an application for ad-interim reliefs. By an order dated 4.5.2007, the learned Judge rejected the same on the ground that the relief sought was replete with

uncertainties. The learned Judge refused ad-interim reliefs only on the point that the reliefs claimed in the Notice of Motion were vague for not providing any identifiable description of the suit plot. The learned Judge clarified that it would be open to the Plaintiffs to renew their request for urgent interim reliefs after amending the plaint.

The Plaintiffs in each of the suits accordingly filed Chamber Summons to amend the plaints in their respective suits. By an order dated 7.6.2007 all the Chamber Summons were allowed and the Plaintiffs in each of the suits amended the plaint.

Thereafter the Plaintiffs took out another application for urgent ad-interim reliefs. By a detailed order dated 13.7.2007, the learned Judge directed the parties to maintain status-quo. This order was modified by an order dated 20.7.2007 permitting limited construction.

64. There is no dispute that to the agreements, there was no plan annexed though clause 1 of the agreements refers to a plan. Nor do the schedules to the suit agreements identify the plots. It is however, important before going further, to reiterate that clause 19 of

the agreement expressly provides that in the event of sub-division not being sanctioned, Defendant No.1 “shall demarcate the said premises and convey the same to the purchasers”.

65. Exhibit C-2, added by the amendment contains particulars of the suit plot as under :-

> “All that piece or parcel of agricultural land situate, lying and being at village Marol Maroshi, Taluka Andheri, in the Registration District and Sub-district of Bombay city and Bombay Suburban and bearing Survey No.169 (Part) C. T. S. No.1627 (Part) admeasuring 2.5 Acres equivalent to 10090 square meters (including proportionate area under road) being a portion of the larger property described in Exhibit-` A to the Plaint and being Plot No.81 with I. O. D. No.EB/CE/6772/BS/AP/ dated 25.09.1995 being Exhibit-`E-1' to the Plaint and delineated on the plan Exhibit-`O'-2 (as substituted/added by amendment) to the Plaint and shown surrounded by red coloured boundary line thereon and belonging to the Plaintiff and also delineated on the Plan Exhibit-`K' to the Plaint shown surrounded by red coloured boundary line thereon and showing proposed Bungalow No.19 thereon and which said proposed bungalow is delineated on the layout plan Exhibit-`E-3' to the Plaint.”

66. Exhibit C-2 especially when read with the documents referred to therein makes it abundantly clear that the suit property has been described with sufficient details making the same identifiable.

67. The question then is whether in fact the premises had been demarcated as per clause 19 of the agreement. The Plaintiffs contend that in fact the plots had been surveyed and demarcated and that RCC poles had been placed. The Defendants as is evident from the correspondence admit the same but deny the correctness of the Plaintiffs identification of the plots. The further question then that arises is whether the Plaintiffs identification of the plots is correct or not. It is necessary therefore to collate the facts I have set out earlier in this regard.

68(i). In paragraph 12 of the plaint, the Plaintiffs have specifically stated that the Defendants' Architect M/s.Bipin Barot in July, 1995 prepared a plan for the construction of a bungalow on each of the said twenty plots of land, pursuant to their obligations under clause 18 of the agreement, on 28.7.1995 submitted the same to the BMC on behalf of the Plaintiffs for construction of cottages and obtained the

IODs and CC's. This aspect of the matter has not been denied.

(ii). The IOD referes to the Defendants notice " and plans, sections, specifications and description and further particulars and details" of the building to be constructed on the larger suit property. Reference to the plans therein is obviously to those submitted by the Defendants but in respect of the suit IOD.

69. The IOD could not have been applied for without the specific location of the proposed construction and the land on which the constructions were proposed to be raised. Without submitting these particulars, it would not have been possible to obtain the IOD. Thus the fact that the IOD was sought and obtained itself indicates that the Defendants had themselves furnished the particulars of the suit plots.

70. It was submitted that the plans in several suits contained the same location of the proposed construction. The fact remains however that IOD's and CC' swere obtained in respect of each of the plots. The other facts also indicate the particulars being available. I would not permit this error then to defeat a just claim. Nor does the fact that there are different numbers given to the plots in different

plans make any difference as in these cases the identification is not by numbers alone.

71. The next document referred to in Exhibit C-2 is the plan at Exhibit O-2. Exhibit O-2 was also added by virtue of the said amendment to the plaint. Exhibit O-2 was prepared by M/s.Rane Management Consultants Pvt. Ltd who were the Plaintiffs' consultants. In paragraph 23 of the plaint, the Plaintiffs have referred in detail to the contents of the letter dated 6.1.2004 which I have already dealt with. The Plaintiffs have also referred therein to the plan at Exhibit O-2 and stated that the survey was carried out between 16.12.2003 and 5.1.2004 on the basis of the plans handed over by the Defendants to the Plaintiffs which is annexed at Exhibit-K which is the next document referred to in Exhibit C-2.

72. It is also pertinent to note that NTM, the maintenance company had by their letter dated 1.9.1996 stated that it had gone through the Master Plan identified, individual precincts like residence and developed a maintenance programme.

Further, by the letter dated 7.12.1998 addressed to each of

the Plaintiffs, NTM had even gone to the extent of referring to the plot numbers. The Defendants have not furnished any details regarding the same. If demarcation was not possible all this could not have been done either.

73. It is important to note that the Defendants have even admitted that the plan dated 10.6.2002 was prepared by their architects M/s. R. V. Jaykar and Surveyor. They also admit that the plan contains the demarcation of the Plaintiff' splot. This is strong evidence, prima-facie at least, in support of the fact that the Defendants had in fact demarcated the suit plots. It is not possible at this stage to accept the Defendant's explanation in regard thereto viz. that the plan only showed a proposed demarcation and that the demarcation was not actually carried out at site. There is nothing on record except the contention on affidavit that supports the same.

74. It is equally if not more important, to note further that in the letter dated 19.5.2002 , the Defendants in fact contended that the demarcation of the plots had been done as requested by the Plaintiffs in the year 2000 itself.

75. Thus two things of crucial importance are established. Firstly the plots were capable of being identified. Secondly, the plots were as per the Defendants' admission identified in the year 2000 by the Defendants themselves.

This then leaves for consideration the question whether the identification of the plots by the Plaintiffs is correct.

76. The Defendants, apart from disputing the validity of the identification of the plots, as contended by the Plaintiffs have done nothing else. They have not stated what according to them is the correct identification. They are in possession of all the documents. They contended throughout that the demarcation had been done as requested by the Plaintiffs. They however, have refused to identify the plots before the Court. They have refused to state what according to them is the correct identity of the plots.

77. The Defendants have thereby precluded a determination of the correctness of the identification of the plots by the Plaintiffs. These circumstances would justify an adverse inference against the Defendants that if they were to produce the material and indicate the

demarcation of the plots, the same would establish the Plaintiffs' case. I must therefore presume that the identification of the Plaintiffs is correct.

78. In this view of the matter, it is not necessary for me to consider the judgment in the case of *Nahar Singh v. Harnak Singh & Ors., (1996) 6 Supreme Court Cases, 699* relied upon by Mr. J. J. Bhatt in support of his submission that a decree for specific performance cannot be granted if a property is not identified. Nor is it necessary for me to consider in this view of the matter, the judgments in the case of *Gaj Kumar Chand v. Lachman ram & Ors., XIV Cal. LJ, 627* and *Pratibha Singh & Anr. v. Shantidevi Prasad & Anr. (2003) 2 Supreme Court Cases, 330* relied upon by Mr.Tulzapurkar in support of his submission that it is sufficient if the property is identifiable and that the identification can also be done by the executing Court.

In whose favour is the balance of convenience ?

79. It was submitted that the balance of convenience is in favour of the Defendants. It was submitted that the Plaintiffs could always be compensated in terms of money.

80. I do not agree. Firstly, this is a fit case where if the Plaintiffs succeed in establishing their case on merits, specific performance can and in fact ought to be granted. Each of the plots admeasures 2.5 acres. On each of the plots, the Plaintiffs are entitled to put up a construction of about 4000 sq.ft. Anyone familiar with the city of Mumbai would know the value of such a property not merely in terms of money but in terms of availability.

81. Mr.Bhatt submitted that the balance of convenience is in favour of the Defendants for as against an aggregate of 80,000 sq.ft. that the Plaintiffs in the above suits would be entitled to construct, the Defendants would in view of the notification under the SEZ Act be entitled to construct about 17,00,000 sq.ft.

82. To accept this submission would be unfair to the Plaintiffs. To accept such a contention would amount to a Court putting its seal of approval on and in fact encouraging a breach of contract. It would amount to permitting parties to avoid their contractual obligations on the ground that they would derive greater advantage monetarily by doing so. I would not add this to the list of grounds on which the

Court would legitimately exercise its discretion against the grant of specific performance.

83. Merely because the Defendants would be entitled in view of the permissions sought under the SEZ Act to put up construction of a larger area is no ground for defeating a just claim. It is not open to a party to avoid a case for specific performance on the ground that its user of the property upon a breach of a contract to sell the same would derive greater monetary benefit. Monetary considerations of a party in breach ought not to prevail over the considerations or preferences of the other party.

84. The balance of convenience is in fact clearly in favour of the Plaintiffs. If the injunction is not granted, the Defendants would be able to defeat the claim for specific performance at the threshold even if ultimately the Plaintiffs succeed in establishing their case. On the other hand if the injunction is granted, the Defendants would not suffer irreparable injury for in the event of the Defendants succeeding at the final hearing of the suit the land will still be available to them.

85. Mr.Bhatt also submitted that construction activity has

already commenced on parts of the land claimed in various suits. Mr.Bhatt relied upon an affidavit of Defendant No.3 dated 17.7.2007 filed in Notice of Motion No.1974 of 2007 in Suit No.1316 of 2007. Annexed to the said affidavit is a plan which indicates the alleged construction. It was contended that construction having commenced and third party rights having been created an injunction ought not to be granted and the Plaintiffs must be relegated to a claim in damages.

86. Firstly, on the ten plots agreed to be purchased by the Mehta group, there is no construction. The constructions are on only some of the plots agreed to be purchased by the Shah group. Even in respect of the plots agreed to be purchased by the Shah group, a substantial area under construction is only in respect of plots which are the subject matter of Suit Nos.1316 of 2007, 1724 of 2007 and 1689 of 2007. On some plots there is no construction. On some of the remaining plots, there is only marginal construction resulting from an overflow of the construction on the other plots.

87. Further, there is a dispute between the parties even as regards the said plan. The Plaintiffs contend that it does not indicate

the location of the construction qua the plots correctly. Thus even assuming that it is open to a Court to mould reliefs in respect of a claim of specific performance, it is not even possible on the record as it stands to consider the same.

88. The Defendants difficulties in this regard are enhanced by their reluctance to disclose the demarcation done by them.

It is only if all these facts are before the Court can there be any meaningful consideration of any application in this regard. The Plaintiffs are always at liberty to make an application if they so desire.

89. It was submitted that the Plaintiffs had asserted a false case regarding their being in possession of the said plots.

90. Firstly, whether the Plaintiffs are in actual physical possession or not makes no difference whatsoever either to the final reliefs or to the grant of interlocutory reliefs. The grant or the refusal to grant either final or interlocutory reliefs does not depend on whether the Plaintiffs are in actual physical possession of the plots or not. Even if they are not in actual physical possession of the plots, they would be entitled to the reliefs both final and interlocutory, if they have

otherwise made out a case for the same.

91. Secondly, I will assume against the Plaintiffs that they are not in actual physical possession of the said plots. I do not see their assertion to the contrary as an attempt to make out a false case. It is more a case of a difference in perception rather than of an assertion of a false case. For instance, both the parties have stated that the plots had been surveyed and demarcated. The Plaintiffs have also alleged that RCC poles had been placed pursuant to the survey and demarcation of the plots. As I have observed earlier, this was not disputed. The correctness of the survey and demarcation no doubt was disputed. In these circumstances, the Plaintiffs could justifiably have presumed or assumed that they were in possession of the suit plots.

92. Lastly, in any event, the question of possession cannot possibly be decided conclusively at this stage on the basis of the record alone. The determination of this question would require further evidence.

93. In the circumstances all the Notices of Motion are made

absolute in terms of prayer (b), except the portions bracketed in red. The prayers would thus read as follows :-

> "(b) That pending the hearing and final disposal of this suit, the Defendants by themselves, their servants, architects and agents or contractors be restrained by an order and injunction of this Hon'ble Court from in any manner either directly or indirectly (i) carrying out any construction activity whatsoever in the said plot (ii) disposing of or encumbering and/or creating any third party rights whatsoever in respect of the suit plot described in Exhibit-`C-2' as added and substituted by amendment to the Plaint and/or (iii) making any application to the State Government, Central Government, MCGM or any other local authorities for change of user of the suit property and/or for change in the terms of I. O. D. and CC and sanctioned plan issued in respect of the suit plot and/or from utilizing the FSI of the suit plot anywhere else in the said larger property described in Exhibit-`A' to the Plaint or otherwise;"

94. The order dated 20.7.2007 passed in seven of the above Notices of Motion, the first of which is Notice of Motion No.1974 of 2007 in Suit No.1316 of 2007 shall continue till 15.12.2007 on the same terms and conditions contained therein. Mr.Sawant on behalf of Defendants states that the entitlement of the Plaintiffs contained in

paragraph 9 of the said order shall continue during the pendency of the suit. The Plaintiffs shall be entitled to submit the report of the Architects, take photographs etc. at any time during the pendency of the stay but after giving the Defendants' advocates notice in writing 48 hours prior to any visit. It is so ordered.

95. Mr.Dwarkadas submitted that in order to avail of this benefit effectually it is necessary that the Defendants furnish the sanctioned plans and IODs in respect of the construction that is being carried out on the said plots covered by the said seven suits. As this was not a part of the order dated 20.7.2007, I do not consider it necessary to grant this order at this stage.

96. The costs of this Notice of Motion shall be costs in the cause.